BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of	)	
	)	
STATE OF MINNESOTA, Acting by and Through the MINNESOTA DEPARTMENT OF TRANSPORTATION and the MINNESOTA DEPARTMENT OF ADMINISTRATION	)	CC Docket No. 98-1
	)	
Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b), and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way	)	

COMMENTS OF U S WEST, INC.

James T. Hannon
U S WEST, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2860

Its Attorney

Of Counsel,
Daniel L. Poole
U S WEST, Inc.

Luisa L. Lancetti
Jeffrey S. Bork
Wilkinson, Barker, Knauer & Quinn, LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 783-4141

March 9, 1998

TABLE OF CONTENTS

SUMMARY

The State of Minnesota has petitioned the Commission to declare that an agreement giving one carrier *exclusive* access — for up to 20 years or more — to public freeway rights-of-way ("ROWs") for installing optical fiber is consistent with Section 253 of the Communications Act. Minnesota first asserts that Section 253 does not govern the arrangement. Next, it argues that, assuming Section 253(a) does apply, the arrangement does not constitute an entry barrier. In addition, Minnesota alternatively contends that the arrangement represents a permissible exercise of state authority to protect the public safety and welfare and to manage the public ROWs consistent with Sections 253(b) and 253(c).

The State's threshold argument that Section 253 does not apply to this arrangement is incorrect. Section 253(a) generally prohibits state and local governments from taking any action having the effect of prohibiting the provision of any telecommunications service. Section 253 thus bars *any* government action having the effect of prohibiting the provision of telecommunications services — regardless of the means by which the government seeks to inhibit entry. Actions barring access to public rights-of-way or restricting the ability of carriers to install needed facilities in the public ROW clearly can have the effect of inhibiting entry — telecommunications services cannot be provided without facilities.

Moreover, the Commission cannot find that the exclusive access arrangement is consistent with Section 253(a). The arrangement on its face limits the means and facilities through which competing carriers may provide service to towns and cities located along the public ROWs in question. In essence, one carrier is granted exclusive rights to "construct, install and operate a fiber optic communications system longitudinally within the" specified freeway ROWs, thereby excluding other carriers from the shortest, most direct route for the construction of facilities to serve communities located along those freeways.

Further, Minnesota's factual presentation regarding the "glut" of intercity fiber transport capacity in Minnesota and the availability of alternative means for providing service, does not justify a Commission finding that the arrangement does not violate Section 253(a). The alternative means of providing service cited do not give competing carriers meaningful access to the ROWs and to the markets located along the ROWs. Moreover, given the extraordinary term of exclusive ROW access granted to the Developer (more than 20 years), the Commission cannot foreclose the possibility that denying access to freeway ROWs may, in the future, have the effect of prohibiting a potential competitor from providing viable service to a particular locality or geographic area within Minnesota. U S WEST submits, therefore, that the Commission must decline to find that the Agreement is consistent with Section 253. To do otherwise, would permit Minnesota "lock up" ROW access to public freeways for an extended period of time, to the sole benefit of a single carrier. Such a result is directly contrary to the important pro-competitive purposes of the Telecommunications Act of 1996.

Nor can the arrangement be justified under Section 253(b), because it fails to satisfy the "competitively neutral" and "necessary" requirements established by that statutory provision. The arrangement obviously does not extend the same opportunities to all carriers; it provides to one carrier access to freeway ROWs not granted to other carriers. Moreover, this exclusive access arrangement effectively "locks-up" the freeway ROWs for more than 20 years.

In so doing, the State effectively transfers to one competitor substantial management authority over the use of public ROWs to provide telecommunications services. Not only has Minnesota failed to show that the Agreement is not "competitively neutral," but also has failed to show that it is necessary to serve Section 253 objectives.

In addition, the arrangement cannot be justified as an exercise of state ROW management authority; indeed, it cannot be characterized as ROW management at all. The arrangement is in effect a contract for the provision of telecommunications infrastructure and services, in which exclusive access to freeway ROWs is provided as consideration. This conclusion is confirmed by the stated purposes for the Agreement, which all relate solely to telecommunications infrastructure and services, as opposed to right-of-way management. Thus, in this context any such ROW function appears ancillary to the Agreement and has been cited by Minnesota in a *post hoc* effort to rationalize the Agreement. In effect, to obtain some free services, the State has transferred control over access to the public ROW to one competing carrier. Notably, the Minnesota House of Representatives has already expressed reservations as to the legality under state law of such action.

U S WEST notes further that Section 253(c) constitutes a limitation upon state and local action that is separate and apart from Section 253(a). Thus, the fact that the arrangement fails to meet the Section 253(c) standards requires the Commission to deny the Petition *regardless* of whether the Agreement constitutes an entry barrier.

Indeed, U S WEST submits that the Commission not only must deny the Petition, but also must preempt the Agreement. While no party has filed a preemption petition, Minnesota's Petition for Declaratory Ruling necessarily places the validity of the Agreement under Section 253 at issue. Moreover, as shown below, the Commission cannot find that the Agreement complies with Section 253(a), fits within the exceptions provided in Section 253(b), or is a permissible exercise of ROW management authority under Section 253(c). As a consequence, the Commission should deny the Petition and preempt the Agreement pursuant to Section 253(d).

BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
STATE OF MINNESOTA, Acting by and Through the MINNESOTA DEPARTMENT OF TRANSPORTATION and the MINNESOTA DEPARTMENT OF ADMINISTRATION	)	CC Docket No. 98-1
	)	
Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b), and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way	)	

COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), hereby files its comments on the Petition for Declaratory Ruling filed by the State of Minnesota, by and through the Departments of Transportation and Administration (jointly "Minnesota").[1] U S WEST views the novel issues raised in Minnesota's Petition from a unique perspective, given that its subsidiaries include both an incumbent local exchange carrier ("LEC") and new entrant competitors of other incumbent LECs.

In U S WEST's view, the Commission cannot find that the project proposed by the Minnesota Petition is consistent with Section 253. Given the extraordinary duration for which Minnesota has granted exclusive access to the state freeway rights-of-way ("ROW"), the Commission cannot determine that the exclusive ROW access arrangement will not constitute an entry barrier, either now or in the future. Further, the Commission cannot find that the Minne-

---

1 *See* "Commission Seeks Comment on Minnesota Petition for Declaratory Ruling Concerning Access to Freeway Rights-of-Way Under Section 253 of the Telecommunications Act," CC Docket No. 98-1, *Public Notice*, DA 98-32 (rel. Jan. 9, 1998).

sota proposal constitutes a reasonable exercise of the state's legitimate ROW management authority. Insofar as the Commission cannot find either that Minnesota's proposal complies with Section 253(a), is covered by the exceptions set forth in Section 253(b), or is a permissible exercise of state authority under Section 253(c), U S WEST urges the Commission to deny the Petition and preempt the Agreement pursuant to Section 253(d).

INTRODUCTION/BACKGROUND

In February 1996, the Minnesota Department of Transportation ("DOT") issued a request for proposals for the installation and its free use of telecommunications transmission facilities in its freeway rights-of-way, in exchange for exclusive access to such rights-of-way for the successful contracting party.[2] According to Minnesota, this proposal would serve various public policy goals.[3] Minnesota further asserts that it evaluated the proposals using its customary procurement procedures based on stated review criteria, standards, and procedures.[4] On

---

2 Minnesota states that Minnesota and federal regulation historically barred utilities from access to interstate highway rights-of-way because of concerns that facility installation and maintenance would adversely affect traffic flows and safety. Although the Federal Highway Administration removed its ban in 1989, the DOT apparently continued the policy with one minor exception. In 1990, the Minnesota legislature required DOT to make a limited exception to this ban to permit one carrier to install fiber optic cable in the freeway right-of-way in Hennepin County. Realizing that it could cut costs in its telecommunications services budget by granting exclusive ROW access in exchange for free capacity, the DOT began reconsidering its ban in the fall of 1995. The RFP, and subsequent agreement are the apparent result of that reconsideration.

3 The stated public policy goals are: (1) increase efficient use of state freeways by supporting development of Intelligent Transportation System ("ITS") applications; (2) extend fiber optic capacity to under-served rural areas; (3) reduce the State's telecommunications costs by exchanging freeway ROW access for transmission capacity; and (4) increase competition by adding another fiber optic network within the state. Petition at 9.

4 *Id.*

August 14, 1996, Minnesota selected the team consisting of ISC/UCN LLC ("the Developer") and Stone & Webster for purposes of negotiation.

On December 23, 1997, the Departments of Transportation and Administration (collectively, "Minnesota") executed an "Agreement to Develop and Operate Communications Facilities" with the Developer and Stone & Webster. Pursuant to the Agreement, the Developer will install fiber optic rings in three regions of Minnesota: the northern part of the state, the southern part of the state, and the Twin Cities metropolitan area.[5] The Developer will operate the fiber network on a wholesale basis, and will not directly offer telecommunications services to the public. However, the Developer can lease capacity to affiliates, which may provide services to the public. While the rights conveyed to the Developer do not cover cellular, PCS, SMR, or DBS facilities, the Developer does retain a "right of negotiation" to obtain ROW access for designing, permitting, siting, installing, leasing, licensing, managing, operating, and providing use to others of cellular, PCS, SMR, and other wireless services.[6]

Minnesota has agreed to provide the Developer with exclusive access to state freeway ROWs for a period of 10 years following the completion of the project (with an option for another 10 year period),[7] subject to certain limitations on the times, locations, and methods of

---

5 Specifically, the Developer will install approximately 1,900 sheath miles of fiber and 76,000 kilometers of fiber strand. Of this, approximately 1,000 sheath miles will be placed on freeway ROWs and the remaining 900 sheath miles will be installed on State Trunk Highway ROWs.

6 Agreement at Section 11.1(c)(iii).

7 Section 11.1 of the Agreement provides the Developer a right of first refusal for an additional ten years, if the State seeks to reopen the freeway ROW. Agreement at 11.1(e).

access to the ROWs.[8] The Agreement itself, however, expires 30 years after the last Acceptance Date for the entirety of Phase I of the Developer's network.[9] Access to the trunk highway ROWs will continue to be on a non-exclusive basis.

In exchange, the Developer will give Minnesota both "lit" and dark fiber capacity on the network (approximately 20% of the total capacity), which Minnesota intends to use to meet its own internal telecommunications needs.[10] Further, at any time during the term of the Agreement, Minnesota may request that the Developer provide it with additional lit or dark capacity, to the extent that it is available, at 80% of the Developer's most favored customer rates and charges or 80% of the rates and charges for similarly situated customers.[11] Finally, upon expiration or early termination of the Agreement, ownership, possession, control, operation, and management of the Network automatically vests in the State.[12]

The Agreement imposes additional duties on the Developer. First, the Developer must, on a competitively neutral and non-discriminatory basis, install and maintain fiber capacity

---

8 Agreement at Sections 3, 7 and 11.

9 *Id.* at Section 2.70. It bears noting that the term of the Developer's exclusive access rights is shorter than the term of Agreement itself. However, Minnesota has made no commitment to provide ROW access to competing carriers once the Developer's exclusive rights expire. Thus, it is reasonable to believe that the Developer will enjoy exclusive ROW access for the life of the Agreement — as long as 30 years.

10 Minnesota states that it will use this capacity for three purposes: (1) to connect 17 DOT offices and 12 Department of Administration locations; (2) to obtain capacity for its Traffic Management Center ("TMC") which provides travelers with information on traffic volumes and weather conditions; and (3) obtain capacity for new, largely undefined "ITS" applications.

11 Agreement at Section 3.3(d)(iv)(A), (B).

12 *Id.* at Section 15.4(b).

owned by third parties.[13] This "collocated fiber," or "non-network capacity," must be installed by the Developer and may be installed only at the same time the Developer installs its own fiber.[14] Collocating carriers will have no right of access onto the ROWs except for extraordinarily narrow circumstances. Specifically, collocating carriers are prohibited from entering onto the freeway ROWs except in an emergency or to cure a material failure by the Developer to perform its obligations.[15] In either case, collocating carriers must first obtain an access permit from the DOT before entering the ROW.[16]

The Agreement sets out the minimum requirements for collocation, conditions which provide little or no control over a carrier's collocated fiber. Further, in order to collocate fiber in the freeway ROWs, a collocating carrier must enter into a User Agreement with the Developer.[17] The User Agreement must be subject and subordinate to the Developer's agreement with the State.[18] In addition, a collocating carrier is given no enforceable interest in the ROW, the User Agreement will not run with the ROW, and the User Agreement is not binding

---

13 For example, the Agreement states that the Developer "shall maintain, offer, accept, implement and adhere to written, uniform and non-discriminatory rates and charges for all similarly situated customers and potential customers for such customer's rights to use or access the Network or to become Collocating Customers." Agreement at Section 7.7.

14 *Id.* at Section 5.12.

15 *Id.* at Section 9.2(h).

16 *Id.*

17 *Id.*

18 *Id.* at Section 9.2(c).

upon any successor to the Developer unless that successor assumes the User Agreement in writing.[19]

In addition to specifying the terms and conditions for the collocation of optical fiber, the Agreement specifies that the Developer must make network capacity, both lit and dark fiber, available to all similarly situated customers at "non-discriminatory" rates and charges.[20] To that end, the Developer is required to file with the DOT (and the DOT will publish) the Developer's customer classifications, rates and charges as well as the consideration the State receives under the Agreement.[21]

On January 5, 1998, Minnesota petitioned the FCC for a declaratory ruling that the Agreement is consistent with the Section 253. Minnesota argues that Section 253 does not govern the arrangement.[22] Minnesota also argues that the Agreement does not constitute an entry barrier, either express or implied.[23] Alternatively, Minnesota asserts that the Agreement represents a permissible exercise of state authority to protect the public safety and welfare and to manage the public ROWs consistent with Sections 253(b) and 253(c).[24]

I. SECTION 253 APPLIES TO THE AGREEMENT

Minnesota first asserts that Section 253 does not apply to its Agreement with the Developer. Minnesota contends that the focus of Section 253(a) of the Act is on telecommunica-

---

19 *Id.* at Section 9.2(b).

20 *Id.* at Section 7.7.

21 *Id.*

22 Petition at 13-17.

23 *Id.* at 17-26.

24 *Id.* at 26-31.

tions service — not on telecommunications infrastructure.[25] Minnesota then argues that the "Agreement is to develop infrastructure and does not involve telecommunications service as that phrase is defined in the Telecom Act."[26] Instead, Minnesota states that the Developer will provide "only wholesale fiber optic transport capacity to telecommunications service providers"[27] and "will not offer or provide telecommunications service to the general public,"[28] although Minnesota acknowledges that the Developer's affiliates may use the facilities to provider services to the public. This argument is fallacious.

Minnesota's construction of Section 253 distorts the express terms and legislative history of Section 253(a). Section 253(a) focuses on neither service nor infrastructure, but rather focuses on any state actions having the *effect* of prohibiting the provision of any telecommunications service. Specifically, Section 253 prohibits *any* state or local government action that "may prohibit or have the effect of prohibiting *the ability of any entity to provide any interstate or intrastate telecommunications service*."[29] The legislative history supports the conclusion that Section 253 is intended to remove all entry barriers, regardless of the means which the state employs to impose entry barriers.[30]

---

25 *Id.* at 13-16.

26 *Id.* at 16.

27 *Id.*

28 *Id.* at 4, 14.

29 47 U.S.C. § 253(a)(emphasis supplied). Indeed, the title of Section 253 is "Removal of Barriers to Entry."

30 For example, Senator Hollings speaking in favor of Section 253 stated that:

> [Section 253] is the removal of the barriers to entry, and that is

(continued...)

In sum, the fundamental question under Section 253 is whether state action or inaction is effectively prohibiting firms from providing telecommunications services. Clearly, the ability to install or obtain access to facilities can be essential to the ability of an entity to provide telecommunications service — *i.e.,* without facilities service cannot be provided. This position is supported by the fact that Congress deemed it necessary to deal with state ROW management authority in Section 253. In other words, the decision to include Section 253(c) is an express recognition by Congress that limitations on ROW-access could constitute an entry barrier. Thus, state action relating to telecommunications infrastructure may be subject to Section 253, if that action improperly impedes a carrier's ability to develop or gain access to needed infrastructure.[31]

---

[30] (...continued)

> exactly the intent of the Congress, . . . and we do not want the States and the local folks prohibiting or having the effect of prohibiting the ability of any entity to enter interstate or intrastate telecommunications services.

141 Cong. Rec. S8174 (daily ed. June 12, 1995). Even the statement of Congressman Tim Holden cited by Minnesota supports this interpretation of Section 253. Specifically, Mr. Holden stated:

> [Section 253(a)] furthers the *vital local telecommunications competition goal by prohibiting states and local governments from erecting barriers to new entrants providing service.* This is an excellent provision, but, because it is a general mandate, there may be creative attempts to get around it . . . .

Petition at 15 (emphasis supplied).

[31] Minnesota is also mistaken in asserting that the Developer will not be a telecommunications service provider. The FCC has recognized that leasing capacity to another carrier "on an in-region interLATA network is plainly an in-region interLATA service." *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934,* 12 FCC Rcd. 8653, 8682-83 ¶ 54 n.110 (1997) (citing *In the Matter of Applications for Authority Pursuant to Section 214 of the Communications*

(continued...)

In light of the above, U S WEST submits that Section 253 applies to the Agreement and Minnesota's efforts to escape review of its Agreement simply because it deals with infrastructure development are without merit. In other words, the Commission must review the Agreement to determine whether it constitutes an entry barrier or is in any way discriminatory or not competitively neutral. In turn, if the Agreement does not meet these standards, it must be preempted.

II. RELEVANT STANDARD AND SCOPE OF COMMISSION REVIEW

As an alternative to arguing that Section 253 does not apply to its Agreement, Minnesota contends that the Agreement and the long-term exclusive access arrangement with the Developer, *in their entirety*, comport with Sections 253(a), (b) and (c). As discussed above, Section 253(a) of the Act generally prohibits state and local governments from taking any action having the effect of prohibiting the provision of any telecommunications service.[32] Despite this general prohibition, under Section 253(b), states may impose requirements on carriers provided they are "competitively neutral" and are "necessary" to support universal service, protect the public safety and welfare, ensure service quality, and safeguard consumers

---

31 (...continued)
Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd. 2589, 2593 (1993), *remanded on other grounds, Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994)). Insofar as the Developer will provide network capacity on a common carrier basis, and it appears that the nondiscrimination provisions of the Agreement require it to act as a common carrier, the Developer appears to be providing a telecommunications service. Thus, to the extent it will be providing telecommunications services, the Developer will be a telecommunications carrier as that term is defined in the Act.

32 47 U.S.C. § 253(a).

rights.[33] In addition, Section 253(c) permits state and local governments to "manage the public rights-of-way" and to "require fair and reasonable compensation from telecommunications providers," provided that such ROW management and compensation schemes are "competitively neutral" and "nondiscriminatory."[34]

Commission Rule 1.2 governing declaratory rulings provides that the Commission "may, . . ., on motion or on its own motion issue a declaratory ruling *terminating a controversy or removing uncertainty.*"[35] Further, a declaratory ruling has been found appropriate under Rule 1.2 where the facts are clearly developed and essentially undisputed, and where the petitioner has made a requisite showing of a "controversy" or "uncertainty" that will actually be terminated upon grant of the Petition.[36] In other words, a declaratory ruling is appropriate only if it will in fact end a proven controversy or uncertainty. By seeking a declaration with regard to Sections 253(a), (b) and (c), the Petition places before the Commission certain fundamental questions: (1) whether the Agreement is effectively an entry barrier; and (2) whether the Agreement is a competitively neutral and nondiscriminatory exercise of state ROW management authority.[37]

---

33 *Id.* at § 253(b).

34 *Id.* at § 253(c).

35 *See* 47 C.F.R. § 1.2.

36 *See Competitive Telecommunications Ass'n*, 4 FCC Rcd. 5364, 5365 ¶ 7 (1989); *American Network, Inc.*, 4 FCC Rcd. 550, 551-52 ¶ 18 (1989); *Request for Declaratory Ruling by Harry Furgatch*, 2 FCC Rcd. 1656 ¶¶ 3-4 (1987).

37 As discussed in more detail *infra* at Section V, Section 253(c) constitutes a limitation on state or local action separate and apart from Section 253(a). Thus, the Agreement may be challenged in court on the grounds that it does not constitute a competitively neutral

(continued...)

The exclusive access provisions of the Agreement lock-up the freeway ROWs for 20 years, or even much longer. During which time, competing carriers are prohibited from installing their facilities in the freeway public ROWs.[38] Whatever may be the impact of the Agreement in today's market, given the speed with which market conditions change in the telecommunications industry, the Commission simply cannot determine at this time that this long-term arrangement will not constitute an entry barrier at some point in the future — much less 20, 30, or more years from now. Consequently, U S WEST submits that the Commission cannot grant Minnesota's request and declare that the Agreement comports with Sections 253(a), (b), and (c). Moreover, Minnesota cannot avoid the implications of Section 253 simply by ceding substantial authority over freeway ROWs to the Developer.

III. THE COMMISSION CANNOT ENDORSE THE AGREEMENT UNDER SECTION 253(a).

A. The Agreement on its Face Appears to Constitute a Barrier to Entry.

U S WEST submits that the Commission cannot endorse the Agreement as being consistent with Section 253(a). Any state or local decision giving a single facilities-based service provider — be it fiber-optic transport, landline telephony, or cable television provider — exclusive access to a public right-of-way must be carefully scrutinized under Section 253(a). Indeed, the Commission has recognized that Section 253(a) "at the very least, proscribes State and local legal requirements that prohibit *all but one entity* from providing telecom-

---

37 (...continued)
exercise of ROW authority without regard to whether the Commission finds an entry barrier violative of Section 253(a).

38 Indeed, given the 30 year term of the Agreement, Minnesota has effectively locked-up the freeway ROWs indefinitely.

munications services in a particular state or locality."[39] Similarly, it has stated that "any grant of *exclusive market entry rights* . . . would raise serious questions under Section 253(a)."[40] The Commission has also noted that a prohibition on entry need not be absolute. Section 253(a) may be implicated where the challenged provision "materially inhibits or limits" the ability of a carrier to compete "in a fair and balanced legal and regulatory environment,"[41] or "substantially raises the costs and other burdens" of providing service.[42] The Commission has also held that legal requirements "that *restrict the means or facilities through which a party is permitted to provide service*" are prohibited.[43]

---

39 *Classic Telephone, Inc.,* Memorandum Opinion and Order, 11 FCC Rcd. 13082, 13095 ¶ 25 (1996) ("*Classic Telephone*"); *see also Public Utility Comm'n of Texas, et al.*, Memorandum Opinion and Order, FCC 97-346, ¶ 107 (rel. Oct. 1, 1997) ("*Texas PUC*") (prohibition from providing service in specific territories preempted).

40 *Texas PUC* at ¶ 89.

41 *Pittencrieff Communications, Inc.*, Memorandum Opinion and Order, File No. WTB/Pol 96-2, FCC 97-343, ¶ 32 (rel. Oct. 2, 1997); *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California*, 12 FCC Rcd. 14191, 14206 ¶ 31 (1997) ("*Huntington Park*").

42 *New England Public Communications Council,* 11 FCC Rcd. 19713, 19721-722 ¶ 20 (1996) *aff'd* 12 FCC Rcd. 5215 (1997) ("*Connecticut Payphone*"); *Texas PUC* at ¶¶ 13, 78. In this regard, a court has found that "[t]he threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition," and that an "excessively cumbersome" application process may be problematic as well. *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 939 n.9 (W.D. Tex. 1997). Also, the fact that potential market entrants may be well-heeled entities with considerable resources to enter a market, standing alone, is not sufficient to demonstrate compliance with Section 253(a). *See Texas PUC* at ¶ 78.

43 *Texas PUC* at ¶ 74. In this regard, the FCC has elaborated that "new entrants should be able to choose whether to resell [incumbent LEC] services, obtain [incumbent LEC] unbundled network elements, utilize their own facilities, or employ any combination of these three options." *Id.*

The Agreement on its face limits the means and facilities through which competing carriers may provide service to towns and cities located along the freeway ROWs. The Agreement provides the Developer with exclusive rights to "construct, install and operate a fiber optic communications system longitudinally within the" specified freeway ROWs.[44] In short, Minnesota is providing one carrier exclusive access to freeway ROWs and, in the process, excluding other carriers from the shortest, most direct route for the construction of facilities to serve communities located along those freeways. This, U S WEST submits, constitutes a barrier to entry.

B. Minnesota's Argument That the Agreement is not "Functionally Exclusive" is Without Merit.

Minnesota, asserts that despite the exclusive access arrangement, the Agreement is not "functionally exclusive" and therefore does not constitute a barrier to entry. According to Minnesota, the Developer will be required to collocate competing facilities in the freeway ROWs and will be required to resell capacity on the network to competing carriers.[45] In addition, Minnesota argues that there is a surplus of intercity fiber transport capacity in Minnesota as well as numerous alternative routes along which competitors can install their own facilities.[46] Given these factors, Minnesota concludes that the Agreement does not prohibit or effectively prohibit any firm from providing any telecommunications services in violation of Section 253(a).[47]

---

44 Agreement at Section 11.1(a).

45 Petition at 10; *see also* Agreement at Section 5.12, 7.7.

46 *See* Petition at 21-25.

47 *Id.* at 25-26.

While these arguments may have superficial appeal, they are not sufficient to permit the Commission to conclude that the Agreement does not constitute an entry barrier. Even a cursory review of the Agreement reveals that the Developer's obligations to permit collocation and the resale of wholesale capacity do not provide for an equal playing field among competing providers. As discussed above, the Developer is obligated to collocate fiber on a one-time basis and only for entities entering a User Agreement. In turn, the terms of this User Agreement are onerous, and place the rights and interests of the third party carrier behind those of the Developer and Minnesota. Further, while the Developer is obligated to sell or lease capacity on a competitively neutral and non-discriminatory basis, it is unclear how such a requirement will be enforced. While the DOT will publish the rates, the Agreement provides no mechanism by which the DOT (or any other agency) can remedy discriminatory rates. It is also unclear whether a third party obtaining capacity from the Developer will have a cause of action for violation of the non-discrimination requirement before the DOT, the Minnesota Public Utilities Commission, or for a violation of Section 253 before the Commission or federal courts, or for a breach of the Agreement before state or federal courts.

Minnesota's factual presentation regarding the competitive nature of the market for wholesale intercity fiber transport capacity in Minnesota may also be appealing on first blush, but is also ultimately unavailing. Given the extraordinary term of exclusive ROW access granted to the Developer (more than 20 years), the Commission's decision must also reflect the potential for change in these relevant markets over the life of the Agreement. In this regard, the Commission has recognized that the telecommunications market is changing rapidly and radically and therefore the market conditions upon which a finding of no entry

barrier must be based are also changing rapidly.[48] In deciding the validity of the exclusive ROW access arrangement, the Commission must *not* ignore the possibility that denying access to freeway ROWs in Minnesota may, during the life of the exclusivity arrangement, prohibit or effectively prohibit a potential competitor from providing viable service to a particular locality or geographic area within Minnesota.[49]

Accordingly, the Commission must decline to issue the requested declaratory order. To do otherwise, would permit Minnesota lock up its freeway ROWs for more than 20 years, to the sole benefit of a single carrier. As discussed below, such a result is directly contrary to the important pro-competitive purposes of the Telecommunications Act of 1996.

C. Exclusive ROW Access is Contrary to the Pro-Competition Policies of the Telecommunications Act of 1996.

In the 1996 Act, Congress recognized the importance of access to rights-of-way to promoting competition. In addition to Section 253(c), which, as discussed below, imposes limits on state and local right-of-way regulation, Congress has enacted Section 251(a)(4), requiring all local exchange carriers to afford access to rights-of-way to competitors, Section 224 authorizing the Commission to regulate the rates, terms and conditions of pole attach-

---

48 Indeed, the Commission has found that a "'temporary' ban on competition that last for a minimum of nine (9) years and a maximum of twelve (12) years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition." *Silver Star Tel. Co., Inc.*, 12 FCC Rcd. 15639, 15657 ¶ 39 (1997) ("*Silver Star*").

49 *See Huntington Park*, 12 FCC Rcd. at 14210 ¶¶ 41-42 (stating "[w]e do not rule out the possibility that [a Section 253(a)] showing could be made" but concluding only that "the *present* record" does not demonstrate a Section 253(a) violation) (emphasis supplied).

ments, and Section 621(a)(2) requiring franchising authorities to authorize installation of cable systems over public rights-of-way.[50]

Moreover, the Commission has gone to considerable lengths in implementing the 1996 Act to ensure that existing rights-of-way are accessible to telecommunications providers.[51] As discussed herein, Minnesota's exclusivity arrangement for the public rights-of-way along freeways raise serious issues with respect to entry barriers and competition in the market(s) for optical fiber transport service in Minnesota. Indeed, it appears that Minnesota has done little more than monopolize public ROWs for its own benefit, for the foreseeable future. The 1996 Act's preemption of express and implied entry barriers, and its particular attention to right-of-way access, requires that Minnesota's exclusivity arrangement be entitled to no presumption of validity. Thus, unless Minnesota can conclusively demonstrate that, during its full life, the Agreement will not constitute a barrier to entry, the Commission should not endorse the Agreement by finding that the exclusive access arrangement is not an entry barrier.

---

50 *See* 47 U.S.C. §§ 224 (pole attachments), 251(b)(4) (LEC requirements), 541(a)(2) (local cable franchising requirements).

51 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd. 15499, 15511 ¶ 36 (1996); *see also Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, CS Docket No. 95-184; MM Docket No. 92-260, FCC 97-376, 1997 FCC LEXIS 5738 *244 ¶ 180 (Oct. 17, 1997) (stating that Commission "ha[s] the authority in certain instances to review restrictions imposed upon" an ILEC's "use [of] its existing easements or rights-of-way to provide new or additional services").

IV. THE AGREEMENT IS NOT PERMISSIBLE UNDER SECTION 253(b).

Minnesota asserts that even if the Agreement constitutes an entry barrier under Section 253(a) it is a permissible exercise of state authority under Section 253(b). In this regard, however, *Minnesota* bears the burden of demonstrating that the requirement is "competitively neutral" and is "necessary to preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[52] Minnesota simply does not meet this burden.

In the context of an outright ban on competition, the FCC has held that "only a facial review of the text of the challenged law" is required to determine that the requirement was not competitively neutral.[53] If the regulation is facially neutral, the Commission will scrutinize the record more carefully to determine if its effect is not competitively neutral.[54] Competitive neutrality, at a minimum, "requires [states and localities] to treat similarly situated entities in the same manner."[55]

Minnesota also bears the burden of demonstrating that the challenged regulation is *necessary* to serve Section 253(b) objectives. To meet this requirement, Minnesota must demonstrate that it has selected the least restrictive alternative, and that other methods are insuf-

---

52 Section 253(b) provides that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b).

53 *See Silver Star*, 12 FCC Rcd. at 15660 ¶ 45.

54 *See Texas PUC* at ¶¶ 220-221 (while provision "does not prohibit" service, it "does not appear to apply equally to resellers of [incumbent LEC's service] and to [the incumbent LEC]").

55 *Classic Telephone*, 11 FCC Rcd. at 13101-102 ¶ 37.

ficient.[56] The Commission has held that it is not enough that a particular regulation or legal requirement is "useful" in promoting that objective,[57] and the agency has also looked unfavorably on a legal requirement imposed where other states have adopted a less restrictive regime.[58] The Commission has adopted this high standard for justifying a regulation as "necessary" to promoting Section 253(b) objectives because any lesser interpretation of the term "is inconsistent with Congress' purpose of removing regulatory barriers to entry in the provision of telecommunications services."[59] In essence, the Commission is concerned that state authority under Section 253(b) must be narrowly drawn because allowing states to impose restrictions under this provision "based only on a minimal showing of need" would "swallow the general rule prohibiting barriers to entry."[60]

The Agreement cannot be justified under Section 253(b) because it does not satisfy the competitive neutrality requirement.[61] Simply put, the Agreement does not extend the same opportunities to all carriers. The Agreement specifically provides the Developer access to

---

56 *See Silver Star*, 12 FCC Rcd. at 15660 ¶ 45; *Connecticut Payphone*, 11 FCC Rcd. at 19722-725 ¶ 22-25.

57 *Connecticut Payphone*, 11 FCC Rcd. at 19723-725 ¶ 24.

58 *Id.* at ¶ 22 n.64. In addition, one federal court has invalidated a local government's exercise of its authority to protect the "health, safety and welfare" of its citizens as not "necessary" where there was already extensive state and federal regulation involved. *See City of Austin*, 975 F. Supp. at 942.

59 *Connecticut Payphone*, 11 FCC Rcd. at 19722 ¶ 21.

60 *Id.* at ¶ 25.

61 Minnesota argues that the Agreement is competitively neutral because it was the result of a competitively neutral request for proposal process. U S WEST submits that this argument is irrelevant. The question is whether the Agreement as it is implemented is in fact competitively neutral — not whether the Agreement came about through competitively neutral procedures.

freeway ROWs not granted to other common carriers. Moreover, this exclusive access arrangement effectively locks-up the freeway ROWs for more than 20 years. Given the pace of technological evolution, this exclusive arrangement provides the Developer substantial existing and future competitive advantages.

In addition, the Agreement effectively transfers to the Developer substantial management authority over the use of freeway ROWs to provide telecommunications services. As discussed above, the Developer's obligations to competing carriers under the Agreement do not provide competing carriers with meaningful access to the freeway ROW or the markets that may be served from the ROWs. The Developer retains the authority to set the rates and terms and conditions by which competing carriers may either collocate facilities or purchase network capacity from the Developer. While the Developer is theoretically bound to provide such services on a "non-discriminatory" basis, the Agreement provides no effective enforcement mechanism. Thus, the Developer has almost absolute discretion to set rates and therefore the discretion to exclude competing carriers from use of the freeway ROWs through exorbitant rates.

Not only has Minnesota failed to show that the Agreement is not "competitively neutral," but also has failed to show that the exclusive ROW access provisions are "necessary" to serve Section 253 objectives and constitute the least restrictive means of serving those objectives. Minnesota asserts that the Agreement and the exclusive access provisions protect the public safety and welfare in two ways, the Agreement will: (1) support the development of ITS and traveler information applications (*i.e.,* signs in the freeway regarding weather and traffic conditions); and (2) will minimize the number of utilities with access to freeway ROWs.

While these goals may be laudable, the Minnesota Petition does not demonstrate why the exclusive access provision is "necessary" to meet either of these goals. First, the

implementation of ITS and traveler information applications are speculative; the State presents no facts regarding when these capabilities will be deployed or how extensive this deployment will be. More importantly, there is no indication as to why the exclusive access provisions of the Agreement are necessary to the development of these applications. In fact, the State would have more options for these applications if multiple users were allowed access to the freeway ROWs. It is reasonable to believe that the state could contract with a single carrier for the provision of such services without providing the winner exclusive ROW access.

While Minnesota has also alleged certain safety benefits to be derived from minimizing access to freeway ROWs, it provides no evidence as to why limiting access to one carrier is the least restrictive means to meet this goal. Minnesota does not address whether it could permit other carriers access to the freeway ROWs based upon the same permitting and operational restrictions imposed upon the Developer. Indeed, the fact that the Agreement provides collocating carriers limited freeway ROW access rights suggests that Minnesota could accommodate a non-exclusive ROW access scheme. If other carrier's access to the freeway ROWs can reasonably be accommodated, U S WEST submits that the exclusive access provision of the Agreement does not meet the necessary to protect the public safety and welfare standard of Section 253(b).

V. THE AGREEMENT IS NOT A PERMISSIBLE EXERCISE OF ROW MANAGEMENT AUTHORITY UNDER SECTION 253(c).

In yet another alternative argument, Minnesota asserts that the Agreement is a permissible exercise of state ROW management authority under Section 253(c). As noted above, the Section 253(a) entry barrier prohibition does not limit a state's authority "to manage the public rights-of-way" or to require "fair and reasonable compensation" from carriers "on a

competitively neutral and nondiscriminatory basis, for use of public rights-of-way," if the compensation required is "publicly disclosed by such government."[62] The FCC has concluded that to satisfy Section 253(c), the state or locality should state a ROW management basis for its legal requirement at the time the action in question is undertaken.[63] Conclusory statements regarding a state or locality's "police powers" offered as a *post hoc* rational for a given action are insufficient.[64]

In light of these general principles, U S WEST submits that the Agreement is not a reasonable or permissible exercise of ROW management authority. Indeed, the Agreement cannot be characterized as ROW management at all. Even a casual review of the Agreement reveals that it is in effect a contract for the provision of telecommunications infrastructure and services, in which exclusive access to freeway ROWs is provided as consideration. In effect, to obtain some free services, the State has effectively transferred control over access to the public ROW to one competing carrier.

This conclusion is confirmed by the four stated public policy purposes for the Agreement, which all relate solely to telecommunications infrastructure and services, as opposed to right-of-way management: (1) increase efficient use of state freeways by supporting development of ITS applications; (2) extend fiber optic network to under served rural areas; (3) reduce

---

62 Section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c).

63 *See Classic Telephone*, 11 FCC Rcd. at 13103 ¶ 41.

64 *Id.*